Nos. 79-1711; 79-1754; 79-1760; 80-12 (Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Supreme Court, U. S.
FILED
DEC 2 1980
MICHAEL RODAK, JR., CLERK

MIDDLESEX COUNTY SEWERAGE AUTHORITY, *et al.*,
Petitioners (79-1711)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

JOINT MEETING OF ESSEX AND UNION COUNTIES,
Petitioner (79-1754)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

CITY OF NEW YORK AND ABRAHAM BEAME,
Petitioners (79-1760)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Petitioners (80-12)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS MIDDLESEX COUNTY SEWERAGE AUTHORITY, TOWNSHIP OF MIDDLETOWN SEWERAGE AUTHORITY AND BERGEN COUNTY SEWERAGE AUTHORITY

STEPHEN J. MOSES
1 Essex Street
Hackensack, New Jersey 07601
(201) 343-6612
Counsel for Petitioner,
Bergen County Sewerage Authority
MENELAOS W. TOSKOS
Of Counsel

VINCENT J. JENNINGS
Of Counsel for Petitioner
Township of Middletown Sewerage Authority
Furman & Jennings, Attorneys

MILTON B. CONFORD
Wilentz, Goldman & Spitzer
A Professional Corporation
900 Route 9
Woodbridge, New Jersey 07095
(201) 636-8000
Counsel for Petitioners,
Middlesex County Sewerage Authority and
Township of Middletown Sewerage Authority
FRANCIS X. JOURNICK
MARVIN J. BRAUTH
Of Counsel

PETITIONS FOR CERTIORARI FILED APRIL 29, 1980 (79-1711); MAY 5, 1980 (79-1754); MAY 5, 1980 (79-1760); JULY 3, 1980 (80-12)
CERTIORARI GRANTED OCTOBER 20, 1980

Questions Presented for Review*

1. Whether the Federal Water Pollution Control Act, 33 *U.S.C.* (& Supp. I) §§ 1251 *et seq.*, and the Marine Protection Research and Sanctuaries Act of 1972, 33 *U.S.C.* (& Supp. I) §§ 1401 *et seq.*, imply a private right of action independent of the rights explicitly created by the citizens suit provisions of those Acts, 33 *U.S.C.* §§ 1365(e) and 1415(g).

2. Whether a private citizen has standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 *U.S.C.* § 1331.

3. Whether any federal common law nuisance action for alleged damages sustained resulting from ocean pollution, if available to a private citizen, is not preempted by the present regulatory scheme governing ocean pollution established by the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act.

---

* These are the questions to which the review is limited under the grant of certiorari (J.A. 48a).

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	(after cover)
CASES CITED	ii
STATUTES CITED	iv
RULES CITED	viii
LEGISLATIVE REPORTS CITED	ix
OTHER AUTHORITIES CITED	ix
LIST OF PARTIES	1
OPINIONS AND JUDGMENTS BELOW	1
JURISDICTION OF SUPREME COURT	1
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	7
ARGUMENT:	
Point I—Neither the FWPCA, as amended, nor the MPRSA, as amended, imply a private right of action under those statutes independent of the citizens suit provisions thereof	12
Point II—The jurisdiction of federal courts under 28 U.S.C. §1331 to entertain federal common-law nuisance actions brought on behalf of plaintiff states for alleged damages from ocean pollution does not extend to private citizen plaintiffs	19
1. Illinois v. Milwaukee envisaged only suits at the instance of states or state agencies	19

PAGE

2. Illinois v. Milwaukee authorized only a suit for abtement of nuisance, not an action for damages 23

3. Policy considerations relative to the best interests of a national water pollution strategy argue for restriction of the federal nuisance action 24

Point III—If a federal common-law nuisance action for ocean pollution is otherwise available to a private citizen, such an action should be held preempted by the present regulatory scheme in that area established by the FWPCA and the MPRSA 31

1. The "savings clause" of FWPCA and MP RSA do not preclude a finding of preemption 32

2. The present scope of FWPCA and MPRSA justifies preemption of federal common-law nuisance actions against sewerage agencies which discharge effluent and dump sewerage sludge under permits pursuant to those statutes 34

(a) FWPCA is now of preemptive scope 35

(b) MPRSA is of preemptive scope 40

3. Considerations of law and policy bespeak preemption in this area 43

CONCLUSION 47

Cases Cited

Burbank v. Lockheed, 411 U.S. 624 (1973) 33, 43

Byram River. v. Village of Portchester, 394 F.Supp. 618 (S.D.N.Y. 1975) 21

PAGE

Califano v. Sanders, 430 U.S. 99 (1977) 15, 33

Cannon v. University of Chicago, 441 U.S. 677 (1979) 17

City of Evansville, Ind. v. Ky. Liquid Recycling, 604 F.2d 1008 (7 Cir. 1979) 14, 17, 18, 21

City of Highland Park v. Train, 519 F.2d 681 (7 Cir. 1975), cert. den. 424 U.S. 927 (1976) 14, 15, 21

Committee for Con. of Jones Falls Sewage System v. Train, 375 F.Supp. 1148 (D. Md. 1974), affirmed on other grounds consistent with that of the district court on the instant issue, 539 F.2d 1006 (4 Cir. 1976) 21-23, 44, 45

Com. of Mass. v. United States Veterans Admin., 541 F.Supp. 119 (1 Cir. 1976) 31

Conservation Soc. of S. Ver. Inc. v. Secretary of Tran., 508 F.2d 927 (2 Cir. 1974) 15

Cort v. Ash, 422 U.S. 66 (1975) 7, 8, 14, 16, 18

EPA v. Water Resources v. Water Resources Control Board, 426 U.S. 200 35-37

East End Yacht Club, Inc. v. Shell Oil Co., 573 F.2d 1289 (2 Cir. 1977) 21

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 29

Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) 20

Hinderlider v. La Plata R. and Cherry Creek D. Co., 304 U.S. 92 (1938) 20

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) ..6, 9, 10, 19-25, 27, 34, 40, 44

Jones v. Roth Packing Co., 430 U.S. 519 (1977) 33, 43

Natural Resources Defense Council v. Callaway, 524 F.2d 79 (2 Cir. 1975) 15

PAGE

Natural Resources Defense Council Inc. v. Train, 510 F.2d 692 (D.C. Cir. 1975) 15

New England Legal Foundation v. Costle, 475 F.Supp. 425 (D.Conn. 1979) 44

Parsell v. Shell Oil Co., 421 F.Supp. 1275 (D. Conn. 1976), aff'd without opinion sub nom. 21, 22

People of State of Ill. v. City of Milwaukee, 599 F.2d 151 (7 Cir. 1979) 44

Philadelphia v. New Jersey, 437 U.S. 617, n.4 (1978) ..33, 43

Potomac River Ass'n. Inc. v. Lundeberg Maryland Seamanship Schools, 402 F.Supp. 344 (D. Md. 1975) 44

Sierra Club v. Morton, 405 U.S. 727 (1972) 16

Stone v. Powel, 428 U.S. 465 (1976) 29

Stream Pollution Bd. of Ind. v. U.S. Steel Corp., 512 F.2d 1036 (7 Cir. 1975) 21

Texas v. Pankey, 441 F.2d 236 (10 Cir. 1971) 20, 21, 25

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 7, 8, 16, 18

Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11 (1979) 7, 8, 16-18

United States v. Atlantic-Richfield Co., 478 F.Supp. 1215 n.5 (D. Mont. 1979) 45

Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966) 30

Wheeldin v. Wheeler, 373 U.S. 647 (1963) 29

Statutes Cited

Administrative Procedure Act:
Sec. 10 15

PAGE

L. 1948, c. 758 5

N.J.S.A. 40:14A-1 3

N.J.S.A. 40:14B-1 3

N.J.S.A. 40:14B-4 7

N.J.S.A. 58:14-1 3

N.J.S.A. 58:14-2 7

15 U.S.C. (Consumer Product Safety Act):

Sec. 24 18

Sec. 2051, et seq. 18

Sec. 2072 18

Sec. 2073 18

Sec. 2619(c)(3) 32

28 U.S.C.:

Sec. 1254(1) 1

Sec. 1331 ..... 15, 19

Sec. 1331(a) 15

33 U.S.C. (Clean Water Act of 1977) (Federal Water Pollution Control Act, as amended) (Supp. I):

Sec. 41 2

Sec. 407 ..... 5, 35

Sec. 1151 et seq. 35

Sec. 1160(a) 35

Sec. 1160(c) 35

Sec. 1160(c)(1) 35

Sec. 1160(c)(3) 35

PAGE

33 U.S.C. (Clean Water Act of 1977) (Federal Water Pollution Control Act, as amended) (Supp. I):

Sec. 1160(c)(5) and (g) 36
Sec. 1160(d) 36
Sec. 1251 5
Sec. 1251(a)(1) 36
Sec. 1281(g) 38
Sec. 1281(g)(2(A) 37
Sec. 1281(h) 38
Sec. 1281(d)(4) 42
Sec. 1281(j) 38
Sec. 1297 ..... 2, 39
Sec. 1311(b) 37
Sec. 1311(b)(1)(B) 37
Sec. 1311(b)(2)(B) 37
Sec. 1314(d)(1) 37
Sec. 1312(a) 37
Sec. 1312(b) 37
Sec. 1313(a) 37
Sec. 1313(c) 37
Sec. 1313(d) 37
Sec. 1313(e) 37
Sec. 1319(a) 38
Sec. 1319(a)(1) 38
Sec. 1913(b) 38
Sec. 1319(c) 38

PAGE

33 U.S.C. (Clean Water Act of 1977) (Federal Water Pollution Control Act, as amended) (Supp. I):

Sec. 1319(d) 17, 38
Sec. 1342 ..... 4, 37
Sec. 1342(a)(1) 38
Sec. 1342(3)(3)-(d)(5) 38
Sec. 1362(14) 37
Sec. 1365(a) 16, 17
Sec. 1365(a)(1) 15
Sec. 1365(e) 8, 12, 13, 15
Sec. 1365(g) 16
Sec. 1370 37
Sec. 1401(b) 40
Sec. 1411 40
Sec. 1412 ..... 40, 41
Sec. 1412(a) 41
Sec. 1412a 4
Sec. 1412a.(b) 4
Sec. 1412(c) 41
Sec. 1413 40
Sec. 1415 42
Sec. 1416(d) 42
Sec. 1418 40
Sec. 1441 et seq. 42

PAGE

33 U.S.C. (Marine Protection Research and Sanctuaries Act, 1972) (Supp. I):

Sec. 505 14
Sec. 505(a) 17
Sec. 1365 ..... 12, 17, 18
Sec. 1365(e) 12, 13
Sec. 1401 5
Sec. 1415(g)(5) 8, 12, 41, 42

33 U.S.C. (Refuse Act):

Sec. 407 5

42 U.S.C. (Clean Air Act):

Sec. 7604 ..... 13, 14
Sec. 7604(e) 32

42 U.S.C. (Noise Control Act of 1972):

Sec. 4911(e) 32

42 U.S.C. (Safe Drinking Water Act) (Supp. II):

Sec. 300(j)-8(e) 32

Supreme Court Rule Cited

Rule 20.1 1

PAGE

Legislative Reports Cited

S. Rep. No. 92-451 1972, U.S. Code & Adm. News, 4234, 4257 ..... 41, 43

S. Rep. No. 414, Reported in 1972, U.S. Code Cong. & Adm. News 3668, 3746 ..... 13, 39

S. Rep. No. 1301, Reported in 1972 U.S. Code Cong. & Adm. News 4232, 4250 13

S. Rep. No. 91-1196 (1970) 13

S. Rep. 1972, U.S. Code Cong. & Adm. News p. 3745 40

S. Rep. 1972, U.S. Code Cong. & Adm. News p. 3758 39

Other Authorities Cited

Friendly, "In Praise of Erie—And Of The New Federal Common Law" 39 N.Y. Univ. L.Rev. 383 passim (1964) 29

I Grad "Treatise on Environmental Law" (1979), §3.08, p. 3-180 ..... 24, 25

Hart & Wechsler's "The Federal Courts and The Federal System" (1973, 2d ed. Bator, Mishkin, Shapiro and Wechsler) p. 806 ..... 23, 26

Note, "Federal Common Law and Interstate Pollution", 85 Harv. L. Rev. 1439, 1451-1452 (1972) 25, 26

Krier, "Environmental Law and Policy 208-232 (1971) 28

Restatement of Torts, Second (1977):

Sec. 821(B) 29

Sec. 826 29

PAGE

Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy", 86 Yale L.J. 1196 (1977) 28

USEPA, "Environmental Impact Statement on the Ocean Dumping of Sewage in the New York Bight" (Final Statement, September 1978), p. 17 ("EIS") 5, 6

Wright, "The Federal Courts and The Nature and Quality of State Law", 13 Wayne L.Rev. 317 (1967) 27

Zener, "The Federal Law of Water Pollution Control" in E. Dolgin & T. Guilbert, "Federal Environmental Law" 788 (1974) 27

List of Parties

All parties are set forth in the caption of the cause set forth on the cover of the petition for certiorari of Middlesex County sewerage Authority, et al. (No. 79-1711).

Opinions and Judgments Below

The opinion of the Court of Appeals for the Third Circuit, filed February 5, 1980, is reported at 616 *F.2d* 1222. The opinion of the District Court for the District of New Jersey is unreported officially but appears at 12 *E.R.C.* 1118.

The opinion and the judgment of the Court of Appeals appear in the appendix to the petition for certiorari of Middlesex County Sewerage Authority et al. at pp. 1a and 38a, respectively; and in the appendix to the petition for certiorari of Environmental Protection Agency et al. at pp. 1a and 32a, respectively.

The opinion and order of the District Court appear in the appendix to the petition for certiorari of Middlesex County Sewerage Authority et al. at pp. 40a and 68a respectively; and in the appendix to the petition for certiorari of Environmental Protection Agency et al. at pp. 35a and 60a, respectively.

Jurisdiction of Supreme Court

Jurisdiction of this Court is invoked by petition for certiorari pursuant to 28 *U.S.C.* §1254(1) on grounds of error in the judgment of the Court of Appeals warranting review by this Court. Certiorari was required to be sought within 60 days after entry of judgment. Rule 20.1.

Constitutional Provisions, Statutes and Regulations

No constitutional provisions are involved herein. The statutes involved in the case are voluminous. The pertinent provisions, except for one, are set forth in the appendix to the petition for certiorari of these petitioners (72a to 105a). The regulations of the United States Environmental Protection Agency incidentally involved are extremely voluminous. The text of any particular regulation is not pertinent to the issues herein. They are therefore not set forth.

Section 41 of the Clean Water Act of 1977 (Federal Water Pollution Control Act, as amended (Supp. I) (33 *U.S.C.* Supp. I §1297), omitted from petitioners' appendix, is as follows:

> "§ 1297. Any guidelines for cost-effectiveness analysis published be the Administrator under this subchapter shall provide for the identification and selection of cost effective alternatives to comply with the objective and goals of this chapter and sections 1281(b), 1281(d), 1281(g)(2)(A), and 1311 (b)(2)(B) of this title."

Statement of the Case

The petition for certiorari in No. 79-1711 was filed by five of the six New Jersey public sewerage disposal agencies made defendants in the action instituted in the District Court. Three of them are represented by this brief. The petition sought review of a judgment of the United States Court of Appeals for the Third Circuit which reversed a judgment of the United States District Court for the District of New Jersey (Honorable H. Curtis Meanor) which dismissed on grounds either of absence of jurisdiction or failure to state a claim upon which relief can be granted the complaint of the plaintiffs seeking both injunctive relief and damages against numerous federal, New York and New Jersey state officials and agencies con-

cerned either with the public disposition of sewage or the administrative regulation of the activities of such agencies. Some of the defendant sewage disposal agencies, including these petitioners, are constituted under New Jersey state authority, others under New York.

The substance of the complaint, set forth in eleven counts, is that defendants by acts of commission or omission have caused or permitted the pollution of the Atlantic Ocean resulting in such damage to the marine environment as to have adversely affected plaintiffs' commercial business of fishing, clamming and lobstering on the shores or in the waters of the ocean. (J.A.18a *et seq.*).

Petitioners are public instrumentalities of New Jersey created under and pursuant to *N.J.S.A.* 40:14A-1 *et seq.*, 40:14B-1 *et seq.* or 58:14-1 et seq.. Petitioner Middlesex County Sewerage Authority* (MCSA) is generally typical of the other New Jersey petitioners in scope of activity, some of them being smaller and others larger. MCSA is responsible for the sewage disposal of 28 municipalities in and adjacent to Middlesex County and a number of large industries. The population it serves is approximately 600,000. Its capital investment is about $250,000,000 and its operating budget for 1980 is $14,874,000. Its operating expenses are met by local taxes and sewer connection fees charged member municipalities and industrial users. Several of petitioners are undergoing a capital expansion program mandated by state and federal environmental authorities and substantially financed by federal grants pursuant to the Federal Water Pollution Control Act (FWPCA) and the Marine Protection, Research and Sanctuaries Act (MPRSA). In the case of MCSA, the expenses of expansion and rising operating costs have almost doubled charges to users in the past year.

---

* Since filing the petition the name of this petitioner has been changed to Middlesex County Utilities Authority. The original name will be used herein.

Existing regulations of the United States Department of Environmental Protection ("EPA") and the 1977 amendment of MPRSA mandate cessation of ocean dumping of sewage sludge* by December 31, 1981. 33 *U.S.C.* §1412a.. Petitioners are in the course of active transition from ocean dumping to landbased alternatives for disposition of such sewage sludge under a schedule of interim permits issued by EPA for ocean dumping at a fixed location, and designed to effect such a shift by the stated termination date. Petitioners have held such permits at all times complained of by plaintiffs.

Petitioners are subject also to EPA permit control of their discharge of sewage effluent into various streams and the ocean under authority of FWPCA. MCSA holds a discharge permit from EPA issued October 31, 1974 under the National Pollutant Discharge Elimination System (NPDES) created under the 1972 amendment of FWPCA (33 *U.S.C.* §1342). It is believed the other New Jersey petitioners also hold such permits.

In the instant class action, plaintiffs seek not only judicial abatement of ocean dumping of sewage sludge by petitioners, thereby disrupting the measured progress toward that end now being effected administratively under Congressional mandate, direction and financial support, but also demand, on behalf of members of the affected class, compensatory damages of $250,000,000 and punitive damages of $250,000,000 from defendants.

Since 1924 municipal sewerage authorities in New York and New Jersey have dumped sewage sludge at a dump site in the Atlantic Ocean approximately 12 miles east of Long Branch, New Jersey (the New York Bight). The Army

---

* Defined in the act as such "waste generated by a municipal wastewater treatment plant the ocean dumping of which may *unreasonably* degrade or endanger human health, welfare, amenities or the marine environment, ecological systems, or economic potentialities" (emphasis added). §1412a.(b).

Corps of Engineers has dumped dredged materials at a nearby site. See USEPA, "Environmental Impact Statement on the Ocean Dumping of Sewage in the New York Bight" (Final Statement, September 1978, p. 17 ("EIS"). Ocean dumping of wastes began to be regulated federally in 1899, Refuse Act, 33 *U.S.C.* §407, and other earlier versions of FWPCA, *i.e.* Act of June 30, 1948, c. 758. Federal regulation of ocean dumping of sludge and discharge of sewage effluent was vastly expanded during the last decade by the 1972 and 1977 amendments of FWPCA, the adoption in 1972 of the MPRSA and the 1977 amendment of that act.

Under the Refuse Act, the Army Corps of Engineers was authorized to grant ocean dumping permits. But under the more recent FPWCA and MPRSA legislation the permit-issuing authority was transferred to EPA, and specific criteria for the issuance of permits were established administratively. 33 *U.S.C.* §1251 *et seq.*, 33 *U.S.C.* §1401 *et seq.*, 40 *C.F.R.* Parts 220 to 229.

In 1974 EPA undertook a study to determine whether the sewage dumping site in the New York Bight should be relocated. EIS, *supra*, p. 1. A draft Environmental Impact Statement was issued in early 1976.

In the summer of 1976 there was a fish kill off the New Jersey coast which constitutes the gravamen of the complaint herein. The fish kill was the subject of comprehensive federal, state and local investigations which concluded that ocean dumping of sewage sludge was only a minor contributing factor. EIS, *supra*, pp. 54-61. That isolated phenomenon led EPA to make further studies on the ocean dumping situation, resulting in a new EIS in 1978. That reached the conclusion that under all the attendant circumstances the most advisable course of action was for the continuance of ocean dumping of sewage sludge at the present site but with encouragement for the construction of improved sewage treatment plants to minimize marine

damage. EIS, *supra*, pp. 62-82, 203-207. Several of the New Jersey petitioners have recently substantially improved their sewage treatment processes. All are of least secondary treatment quality.

Insofar as concerns these petitioners, the disposition of the issues presented on defendants' motions to dismiss by the lower courts was as follows.

As to the claims asserted under FWPCA and MPRSA, the District Court held that the claims must be dismissed because of failure of timely service of notice on the defendants prior to institution of the action, as required by the respective statutes (pet. cert. app. 56a). On this issue the Court of Appeals reversed, holding that absence of notice was not fatal because of the "savings clause" of the citizens action provisions of the statutes which preserve any existing right of action under any statute or common law (pet. cert. app. 10a). As to plaintiffs' contention that, independent of any right of action under the express citizens' suit provisions of FWPCA and MPRSA, they could maintain the suit pursuant to (a) an implied right of action under those statutes and (b) the theory of federal common-law nuisance, relying primarily on *Illinois* v. *City of Milwaukee*, 406 *U.S.* 91 (1972), the District Court held that there was no implied action, that the federal nuisance remedy was available only in favor of states, not private parties, and that the notice provisions of the statutes remained applicable to any actions brought under the "savings clause." (pet. cert. app. 47a). The Court of Appeals reversed these determinations, holding that a private federal common-law nuisance claim was available under the *Illinois* case and an implied claim under FWPCA and MPRSA as well, free of the notice requirement (pet. cert. app. 28a-29a, 6a-14a).

As concerns plaintiffs' reliance upon admiralty and maritime jurisdiction of the federal courts, the District Court held that there was a failure to plead a cause of action

cognizable under such jurisdiction. The court alternatively held that even if the complaint was read to encompass a substantive claim under such jurisdiction, it would have to be dismissed for failure of compliance with the notice requirements of state tort claims statutes (excepting the case of New York City). (pet. cert. app. 62a, 63a). The Court of Appeals held that a more liberal reading of the complaint was required at the pleading stage and that the asserted cause of action was viable although essentially identical with the federal common-law tort nuisance claim. (pet. cert. app. 29a-31a).

Petitioners sought on appeal to sustain the judgment of the District Court, insofar as the complaint demands money damages, on grounds of sovereign immunity under the Eleventh Amendment. The Court of Appeals summarily rejected the sovereign immunity defense; citing no cases but only *N.J.S.A.* 40:14B-4 and *N.J.S.A.* 58:14-2 and noting that the defendants were municipal corporations (pet. cert. app. 36a). The defense of the Eleventh Amendment is excluded from consideration herein under the questions framed in the grant of certiorari.

Four petitions for certiorari were filed, one including the petitioners represented by this brief. All were granted by Order of this Court dated October 20, 1980 (J.A. 48a). The questions were ordered limited to those set forth first hereinabove. *Ibid.*

Summary of Argument

1. Neither FWPCA nor MPRSA imply a private right of action independent of the citizens suit provisions of those statutes. The four critical factors for implying a private cause of action from a regulatory statute set forth in *Cort* v. *Ash,* 422 U.S. 66 (1975), have been substantially diluted by the more recent formulation in *Touche Ross & Co.* v. *Redington,* 442 *U.S.* 560 (1979) and *Transamerica*

Mortgage Advisors v. *Lewis,* 444 *U.S.* 11 (1979). The four *Cort* factors do not have equal weight. *Touche Ross,* at 575, "The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action". *Ibid.* Substantial weight is to be accorded the circumstance that the statute in question expressly provides for a private cause of action. *Id.* at 574. This analysis is pertinent to the present case since both of the statutes involved provide expressly for citizens suits thereunder, within stated limitations as to notice and otherwise.

Reliance by the Court of Appeals on the language in the "savings clause" of FWPCA, 33 *U.S.C.* §1365(e), which states that nothing in the section "shall restrict any right which any person * * * may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief * * *" and on the similar provision of MPRSA, 33 *U.S.C.* §1415(g)(5), is mistaken. The allusion to "any statute" does not include FWPCA (or MPRSA) itself. The legislative history indicates that the intent of the reference is to any other statute.

Implication of a private remedy for damages under either Section 1365(e) of FWPCA or Secion 1415(g)(5) of MPRSA would be inconsistent with the Congressional purpose implicit in both acts of encouraging private participation in the enforcement thereof but only within the channels expressly provided (especially prior notice), and would thereby contravene the third factor identified in *Cort* v. *Ash, supra,* namely: is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" (422 *U.S.* at 78). This court stated in *Touche Ross, supra,* that it was "extremely reluctant to imply a cause of action in [the statute] that is significantly broader than the remedy that Congress chose to provide". (442 *U.S.* at 574).

2. To the extent that a federal common-law nuisance action may at all survive the now asserted preemptive effect of FWPCA and MPRSA, as currently amended, in relation to suits for ocean pollution against publicly owned sewerage works, it should be held that a private citizen may not maintain such an action.

The predominant rationale of the opinion in *Illinois* v. *Milwaukee,* 406 *U.S.* 91 (1972), establishing a federal common-law nuisance action for interstate water pollution at the behest of states, was the need to afford states legal protection in federal courts against pollution emanating from beyond the state's borders—protection required by the inability of states in this federal union otherwise to be relieved from such harm. Indirectly involved, also, was the constitutional original jurisdiction of the Supreme Court to entertain actions by states against citizens of other states invoked by the plaintiff in that case, and the pragmatic desire of the Court to minimize involvement in original actions. This conduced to establishing remedial jurisdiction therefor in the district court. These considerations are not pertinent to private citizens aggrieved by interstate nuisances involving water pollution. They are free to bring such actions in state courts. Current notions of due process under minimum-contacts rules would permit nuisance actions against foreign sources of local water pollution in local state courts. Consequently, considering also the availability of citizens suits under the regulatory statutes, private citizens have adequate recourse to relief without encumbering overburdened federal district courts with nuisance suits.

The best scholarship in environmental law is in agreement that because of its *ad hoc* nature the common-law nuisance action does not contribute functionally to a sound system for control and regulation of environmental pollution and that comprehensive legislative and administrative regulation is better suited to that end.

Elimination of privately brought nuisance actions in federal courts would be consistent with such views. Moreover, the same considerations which will be advanced hereinafter militating for a doctrine of partial preemption of federal nuisance remedies in the water pollution field by the comprehensive federal regulatory machinery now in place also support, *a fortiori,* superseding citizens nuisance actions for ocean pollution against publicly owned sewerage disposal agencies.

3. The prediction in *Illinois* v. *Milwaukee* that a time might come when the statutory and regulatory mechanism for control of water pollution would be so comprehensive as to warrant preemption of a federal common-law nuisance cause of action is now fulfilled. When *Illinois* was decided, the 1972 and 1977 amendments of FWPCA had not yet come into effect nor had Congress yet enacted MPRSA. The latter statute (amended in 1977) is here particularly significant in that the gravamen of the present action against the New Jersey and New York sewerage agencies is the dumping of sewage sludge in the New York Bight.

The present scope of these statutes and of the extent and effect of the administrative regulations adopted by EPA pursuant thereto effectively subjects petitioners and industrial water dischargers to the closest and most detailed scrutiny and oversight readily conceivable. Moreover, in respect of petitioner public sewerage agencies, Congress has appropriated massive federal funds for the planning and construction of improved sewerage treatment facilities and for land-based alternatives to ocean dumping of sewage sludge.

By the resulting establishment of the partnership between federal, state and local agencies involved in the comprehensive program of reduction and eventual elimination of pollution of the ocean, Congress has clearly manifested an intent against the continued availability of common-law nuisance actions in federal courts against public sewerage

agencies so controlled and regulated. The maintenance thereof, particularly in respect of damage suits, would conflict with and obstruct and impede the efficient execution of the federally managed and financed programs for ultimate cessation of ocean pollution by such agencies at the earliest feasible date.

Subjection of public sewerage agencies to the hazard of common-law nuisance suits, wherein no predictable judgment as to the responsibility of the agencies would be available in advance, would conflict and be inconsistent with the evident Congressional purpose of informing such agencies what standards of pollution prevention were expected of them and the dates by which such specific goals were to be reached. Moreover, the subjection of such agencies to the possibility of substantial verdicts for money damages would cripple and impede them, unduly penalize the participating public and would be at cross-purposes with the massive infusion of federal money into the federally mandated programs for solution of the water pollution problem.

As noted above, the comprehensive and uniform federal regulation of water pollution now in place is vastly preferable to the *ad hoc* remedy of judicial attention to isolated pollution situations in the context of tort litigation.

For these reasons, it should now be concluded that Congress intends the preemption of the federal common-law nuisance remedy, in respect of sewage sludge dumping and discharge of sewage effluent by publicly owned sewage agencies operating under federal regulation, by the scheme of the existing comprehensive federally legislated program of control of ocean pollution.

ARGUMENT

POINT I

Neither the FWPCA, as amended, nor the MPRSA, as amended, imply a private right of action under those statutes independent of the citizens suit provisions thereof.

The Court of Appeals held that both the FWPCA and the MPRSA implied a private cause of action for violation by any person or agency of the regulatory provisions of those statutes. Reliance was had upon 33 *U.S.C.* §1365 (e) of FWPCA and upon the similarly worded provision in MPRSA (33 *U.S.C.* §1415(g)(5).

So far as here pertinent, 33 *U.S.C.* §1365 provides in substance: Any citizen may commence a civil action against any person or governmental agency alleged to be in violation of an effluent standard or limitation under the law or an order by the EPA administrator or a state concerning such a standard or against the administrator if charged with failure to perform a non-discretionary duty. The district court is given jurisdiction in such cases without regard to citizenship or amount in controversy and may apply any civil penalties provided by the law. No citizens action may be commenced prior to 60 days after plaintiff has given notice of the violation to the Administrator, to the state where the violation occurs and to any alleged violator, nor may such action be instituted if the administrator or the state has commenced and is diligently prosecuting a civil or criminal action to require compliance with the standard or order. If the action is brought against the administrator, 60 days prior notice must be given to him.

The Section concludes as follows:

> "(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforce-

> ment of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."

The Court of Appeals was impelled to the stated conclusion as one of its two bases for sustaining jurisdiction in the absence of compliance by plaintiffs with the sixty day notice provisions of these statutes. In effect, the court read the allusion to "any statute" in subparagraph (e) of Section 1365 to include the subject statute itself. The clear sense of the language employed, however, is that "any statute" means any statute other than FWPCA itself. Indeed, the 1972 Senate report on the FWPCA bill explained, in reference to the savings clause:

> "It should be noted * * * that the section would specifically preserve any rights or remedies under *any other law.*" (emphasis supplied)
>
> S. Rep. No. 414, Reported in 1972, *U.S. Code Cong. & Adm. News* 3668, 3746.

Substantially the same reasoning is contained in the Senate report on the MPRSA bill. S. Rep. No. 1301, Reported in 1972, *U.S. Code Cong. & Adm. News* 4232, 4250.*

The Court of Appeals alluded to the cited FWPCA history but dismissed it with the conclusional observation that the court was "not persuaded that this paraphrase of the wording of the Act was intended to preclude the finding of a private remedy under the Act." (pet. cert. app. 16a). One wonders, why not? The act obviously fashions a specific citizens remedy and at the same time seeks to preserve any private remedies which may exist under any other act or common law. What sensible basis remains for implying yet another remedy under the act itself?

---

* Identical reasoning is contained in the Senate report on the Savings Clause of the Clean Air Act, 42 *U.S.C.* §7604, upon which the savings clause in FWPCA was modeled. S. Rep. No. 91-1196 (1970).

It does not appear that any other court of appeals is in agreement with the holding of the Third Circuit in this case. The best reasoned decision on the point is that of the Seventh Circuit Court of Appeals in *City of Evansville, Ind.* v. *Ky. Liquid Recycling,* 604 *F.2d* 1008 (7 Cir. 1979). After alluding to the legislative history cited above, the court noted that the rejection by Congress of all but two of the proposed exceptions to the requirement of a sixty day waiting period for a citizens suit (alluding to the legislative history as set forth in footnote 16 of the opinion) "reinforces the evidence in §505 [Section 1365] itself of an intent to circumscribe private rights of action under the FWPCA" (604 *F.2d* at 1015). The court noted that its discussion of Section 505 as precluding a private remedy was also consistent with the third factor identified in *Cort* v. *Ash,** 422 *U.S.* 66, 78 (1975), as a criterion for judicial implication of Congressional intent to create a private cause of action, namely, "is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" 604 *F.2d* at 1015.

The same court had rendered a comparable decision in reference to the similar savings clause of the Clean Air Amendments of 1970 (42 *U.S.C.* §7604). *City of Highland Park* v. *Train,* 519 *F.2d* 681 (7 Cir. 1975), cert. den. 424 *U.S.* 927 (1976). The court there held the failure to give the required statutory notice to be fatal to the action. It pointed out that although there was clear indication by express proviso of intent to allow citizen participation in the enforcement of the act, the legislative history also demonstrated:

---

* The other criteria mentioned in *Cort are*: (a) whether plaintiff is one of the class for whose *especial* benefit the statute was enacted; (b) indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; (d) is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on Federal Law. (emphasis in original opinion). 422 *U.S.* at 78.

> "that Congress intended to provide for citizens' suits in a manner that would be least likely to clog already burdened federal courts and most likely to trigger governmental action which would alleviate any need for judicial relief. It was in response to these concerns that the statutory notice provisions were included in section 304. Congress's intention would be frustrated if the statutory mandate of section 304(b) were ignored." (footnotes omitted). 519 *F.2d* at 690-691.

While there appear to be no prior federal appellate rulings expressly to the contrary of the position of the Seventh Circuit, several cases have allowed actions against EPA or other federal governmental administrators without prior notice in purported pursuance of FWPCA *via* the putative jurisdictional avenue of the Administrative Procedure Act* and 28 *U.S.C.* §1331, thereby circumventing the notice provisions of the statutes. *Conservation Soc. of S. Ver. Inc.* v. *Secretary of Tran.*, 508 *F.2d* 927 (2 Cir. 1974); *Natural Resources Defense Council* v. *Callaway*, 524 *F.2d* 79 (2 Cir. 1975); *Natural Resources Defense Council Inc.* v. *Train*, 510 *F.2d* 692 (D.C. Cir. 1975).

None of the cases cited expressly finds an implied cause of action under the statute involved. As noted in *City of Highland Park* v. *Train, supra,* (519 *F.2d* at 693), the rationale in each of those decisions for invoking 28 *U.S.C.* §1331(a) is obscure.

To buttress its contention of a general private cause of action under FWPCA, the Court of Appeals below labors to establish a rationale of entitlement to an action by *non-injured* citizens under §1365(a)(1) and of a companion species of action by *injured* citizens under paragraph (e) of the section. It bases the distinction upon legislative

---

* The rationale of Section 10 of the Administrative Procedure Act as an independent basis for jurisdiction in the federal courts to review actions of federal officials was undermined by the contrary holding in *Califano* v. *Sanders*, 430 *U.S.* 99 (1977).

history supposedly designed to meet the decision of this court in *Sierra Club* v. *Morton,* 405 *U.S.* 727 (1972) (pet. cert. app. 7a). But the thesis does not withstand scrutiny of the statutory language. Concededly *Sierra Club* held that review of federal agency action by parties who could not show injury was not available under the Administrative Procedure Act. However, the definition in §1365 (g) of a "citizen" who is permitted to institute a civil action under paragraph (a) is "a person or persons having an interest which is or may be adversely affected." That definition tracks the *Sierra Club* language concerning injured persons (the suitor must show "that he is himself adversely affected") (405 *U.S.* at 740). It is thus clear that section (a) actions may be brought only by injured persons, contrary to the thesis of the Court of Appeals, and the supposed distinction advanced to support its holding that there is a private action independent of paragraph (a) does not stand up.

The criteria of *Cort* v. *Ash, supra,* particularly as qualified by *Touche Ross & Co.* v. *Redington,* and *Transamerica Mortgage Advisors* v. *Lewis,* both *supra,* do not justify implication of an independent federal cause of action. At best, the factors require a balanced approach and are not all of equal weight. *Touche Ross,* 442 *U.S.* at 575. The most important of them is the second, *i.e.* any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one. *Touche Ross, supra, Ibid.* "[t]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action". *Ibid.* The court in *Touche Ross* found signal justification for refusing to find the implication of a private remedy under one section of the act there involved because other sections of the statute "expressly provide a private right of action" (442 *U.S.* at 571-572). The court went on to say:

> "Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so

and did so expressly" (*Id.* at 572) citations omitted).

The court said, further:

> "* * * Where the prinicpal express civil remedy for misstatements in reports created by Congress contemporaneously with the passage of Section 17a is by its terms limited to purchasers and sellers of securities, we are extremely reluctant to imply a cause of action in Section 17a that is significantly broader than the remedy that Congress chose to provide." (*Id.* at 574) (citations omitted).

To the same effect see *Cannon* v. *University of Chicago,* 441 *U.S.* 677, 718 (1979).

So, too, as to Section 1365. Section 1365 expressly permits citizens to bring civil actions against any person alleged to be in violation of an effluent standard or limitation or of an order issued by the administrator or a state with respect to such standard or limitation and to request the court to apply any appropriate civil penalties under Section 1319(d) of the Act—penalties which can amount to $10,000 per day of any violation. There is no basis to imply Congressional intent to permit the assessment of damages in excess of that figure in common-law tort actions under the act at the instance of private parties. There is particularly no evidence of any intent to permit evasion of the statutory notice requirement through the escape hatch of such common-law tort actions, see *City of Evansville, Ind.* v. *Ky. Liquid Recycling, supra,* (604 *F.2d* at 1014), where it is pointed out that the Senate committee report in reference to Section 505(a) of the act (Section 1365(a)) makes clear that it did not contemplate class actions or actions for damages.

The analysis in *City of Evansville* gains added cogency from the recent decision of this court in *Transamerica Mortgage Advisors* v. *Lewis, supra.* There, too, the court rejected a claim for implication of a private cause of action for damages under a regulatory statute, pointing out,

as did the *City of Evansville* court, that "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it" (62 *L.ed. 2d* 146, 154-155). The court thus declined to find an implied private damage action under the statute, the legislation having provided several express remedies for the evils sought to be overcome. As in *Touche Ross, supra,* the court downgraded the four criteria of *Cort* v. *Ash, supra.* It specifically minimized the criteria (a) as to the intent of the statute to protect certain categories of persons and (b) that the claimed private remedy may be one not traditionally relegated to state law, as not determinative of the issue. It reiterated the controlling influence of Congressional intent, as stressed in *Touche Ross.*

Applying the teaching of *Touche Ross* and *Transamerica Mortgage Advisors,* we find in the statutes under scrutiny that they explicitly provide certain remedies for citizens and that they save such *other* remedies as may exist either by statute or common law in favor of any person. In combination, this evidence overwhelmingly negates any intent to create a private remedy under FWPCA or MPRSA themselves.*

---

* Striking additional evidence of Congressional intent not to create a private remedy under the 1972 amendments of FWPCA or by MPRSA is afforded by the fact that practically simultaneously with the passage and adoption of those statutes the 92nd Congress also considered and passed the Consumer Product Safety Act (15 *U.S.C.* §2051, *et seq.*). Section 24 of that act (15 *U.S.C.* §2073) contains a provision for citizen suits to enforce consumer safety product rules similar to 33 *U.S.C.* §1365. However, the act *also includes* an express provision for a private damage remedy (15 *U.S.C.* §2072). The comparative treatment of express provisions for private citizens actions in these contemporaneously adopted enactments lends added point to the observations in *Touche Ross* and *Transamerica Mortgage* that when Congress intends to provide a private damages remedy in a regulatory statute it can be expected to do so expressly.

POINT II

The jurisdiction of federal courts under 28 *U.S.C.* §1331 to entertain federal common-law nuisance actions brought on behalf of plaintiff states for alleged damages from ocean pollution does not extend to private citizen plaintiffs.

The significance of this point heading is that the Court of Appeals held that, independent of the regulatory statutes here in question, the plaintiffs' cause of action could be maintained in the district court under its 28 *U.S.C.* §1331 jurisdiction as a federal common-law nuisance action. Reliance was placed upon the decision of this Court in *Illinois* v. *Milwaukee, supra.* We propose to argue that considerations both of law and public policy bespeak preclusion of availability of such a remedy to private party plaintiffs; either generally, or at least in relation to actions against publicly-owned sewerage agencies operating under regulatory permits issued pursuant to FWPCA or MPRSA.

1. *Illinois* v. *Milwaukee* envisaged only suits at the instance of states or state agencies.

The *Illinois* case began as a bill of complaint by the State of Illinois invoking the original jurisdiction of the Supreme Court to abate pollution emanating from a sewerage agency in Wisconsin and reaching the shores of Illinois on Lake Michigan, an interstate waterway. The Supreme Court rejected original jurisdiction but found adequate jurisdiction in the district courts under 28 *U.S.C.* §1331 on the hypothesis that the complaint stated a cause of action for federal common-law nuisance.

While the opinion in *Illinois* draws the contours of federal jurisdiction in relation to interstate waters with a broad brush, the predominant rationale is the need of

states for protection in presumably neutral federal courts from pollution emanating from another state whose courts might be hostile to an action on behalf of the injured state. *Illinois* cited as the leading case in the comparable area of air pollution *Georgia* v. *Tennessee Copper Co.*, 206 *U.S.* 230 (1907), where, in sustaining the action by Georgia against a Tennessee company whose noxious gases were causing widespread destruction in Georgia, the Court said:

> "* * * It is plain that some such demands must be recognized, if the grounds alleged are proved. When the States by their union made the forceable abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possiblity of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court. *Missouri* v. *Illinois*, 180 *U.S.* 208, 241." (206 *U.S.* at 237).

Almost all the precedents cited by the court in *Illinois* were actions on behalf of states.* In *Texas* v. *Pankey*, 441 *F.2d* 236 (10 Cir. 1971), also relied upon by the court in *Illinois*, one finds perhaps the first distinct articulation of a federal common-law nuisance theory in respect of actions by states for abatement of interstate pollution. Yet *Pankey* also focused on the justification for assuming such a cause of action in the historical conditions under which the several states entered the union. Citing *Georgia* v. *Tennessee Copper Co., supra*, the court said: "* * * the [Supreme] Court regarded a state's joinder in the Union and its commitment to the Constitution as having inherently insured

---

* The allusion in the opinion (406 *U.S.* at 105) to *Hinderlider* v. *La Plata R. and Cherry Creek D. Co.*, 304 *U.S.* 92 (1938), is not pertinent to the law of nuisance for interstate pollution damages. *Hinderlider* dealt with and was based upon the jurisdiction of the Supreme Court over the apportionment of water rights in an interstate stream as between states.

or guaranteed to it a right of protection by a federal court against improper pollution or impairment by outside sources of its appropriate environment and resource conditions" (441 *F.2d* at 240).

The almost unanimous view of the lower federal courts prior to the decision by the Court of Appeals in the instant case is in support of the position of the district court in the present case confining the federal common-law nuisance action to suits by states.* *Committee for Con. of Jones Falls Sewage System* v. *Train,* 375 *F.Supp.* 1148 (D. Md. 1974), affirmed on other grounds consistent with that of the district court on the instant issue, 539 *F.2d* 1006 (4 Cir. 1976) en banc); *Parsell* v. *Shell Oil Co.,* 421 *F.Supp.* 1275 (D. Conn. 1976), aff'd without opinion *sub nom. East End Yacht Club, Inc.* v. *Shell Oil Co.,* 573 *F.2d* 1289 (2 Cir. 1977); *Stream Pollution Bd. of Ind.* v. *U.S. Steel Corp.,* 512 *F.2d* 1036 (7 Cir. 1975) (private citizen denied intervention); *cf. Highland Park* v. *Train, supra,* (519 *F.2d* 681); but see *Byram River* v. *Village of Portchester,* 394 *F.Supp.* 618 (*S.D.N.Y.* 1975).

In *Committee for Con. of Jones Falls Sewage System* v. *Train, supra,* the court observed that the plaintiffs in the two principal cases cited in *Illinois* v. *Milwaukee* were states and that each of those cases "indicates that the character of the plaintiffs as governmental units was integral to the determination that a federal cause of action existed." 375 *F.Supp.* at 1153. Although affirming the determination of the district court in that case on other grounds, the Court of Appeals for the Fourth Circuit on appeal therefrom rendered its independent analysis of *Illinois* v. *Milwaukee* and *Texas* v. *Pankey* as developing "[o]f necessity * * * a body of federal common law for the reso-

---

* In *City of Evansville, Ind.* v. *Ky. Liquid Recycling, supra,* (604 *F.2d* at 1018) plaintiffs municipal corporations were held equivalent to the state for purposes of invoking *Illinois* v. *Milwaukee* relief.

lution of interstate pollution controversies when a state sought extra-territorial relief on behalf of her citizens." 539 *F.2d* at 1008. The court further observed that:

> "Perhaps with the exception of actions by the United States to abate public nuisances created in navigable waters by polluters, [citing cases] but consistent with §1251(b) [FWPCA] the doctrine of *Illinois* v. *Milwaukee* has not been extended beyond the abatement of public nuisance in interstate controversies where the complainant is a state and the offenders are creating extra-territorial harm." (f.n. omitted) (per Haynsworth, C.J.) 539 *F.2d* at 1009.

Similarly emphasizing the significance of the character of the plaintiff in *Illinois* v. *Milwaukee* and in the cases there relied upon is *Parsell* v. *Shell Oil Co., supra,* (421 *F.Supp.* at 1280-1281).

The Court of Appeals in the instant case lays stress (pet. cert. app. 25a) upon footnote 6 in *Illinois* v. *Milwaukee,* 406 *U.S.* at 105, to the effect that:

> "Thus, it is not only the character of the parties that requires us to apply federal law * * * [W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law."

The implication of the Court of Appeals is that the footnote indicates that a state party plaintiff is not essential to the federal common-law nuisance action if the substantive federal question implicated is one calling for doctrinal uniformity. That thesis was refuted in *Committee for Con. of Jones Falls Sewerage System* v. *Train, supra,* (375 *F.Supp.* 1148), where the court, in dealing with the same *Illinois* footnote, said:

> "'it is not only the character of the parties that requires us to apply federal law.' This statement can be read in at least two different ways. It could

> mean a) that there were other considerations sufficient in themselves to require application of federal law, or b) that there were other federal interests which in addition to the character of the parties required the application of federal law although those other interests in themselves would not have been sufficient. In the view this Court takes of the basis for the Supreme Court's decision, the latter interpretation is the proper one." 375 *F.Supp.* at 1154-1155, n. 12.

We submit that the foregoing analysis should be accepted by this Court as a sound explanation of the mooted footnote in *Illinois*. If the *Illinois* Court had intended the newly announced federal common-law nuisance action to be available to private parties it is unlikely that the opinion would have failed so to state explicitly.*

Moreover, the policy considerations discussed hereinafter conduce to the argued-for result, whatever the intent of the Court in subscribing to the *Illinois* opinion in 1972.

2. *Illinois* v. *Milwaukee* authorized only a suit for abatement of nuisance, not an action for damages.

The decision of the Court of Appeals in this case not only extends the doctrine of *Illinois* v. *Milwaukee* to private claimants but also would enable them to recover damages against defendant public sewerage agencies. We submit that that consequence is particularly unwarranted from the substance of the *Illinois* decision. If, as we contend, the Court in *Illinois* was concerned only with *abatement*

---

* A leading work on the subject concludes that:

> "Justice Douglas' opinion casts no light on the question whether federal common-law governs suits to abate interstate pollution brought by private persons."

Hart & Wechsler's "The Federal Courts and The Federal System" (2d ed. 1973, Bator, Mishkin, Shapiro and Wechsler) p. 806.

of nuisances emanating from one state into another, it would follow that a private tort action for nuisance *damages* may not be subsumed under the *Illinois* v. *Milwaukee* umbrella.

In *Illinois,* abatement of the alleged nuisance was all that the complaint demanded (406 *U.S.* at 93). The patent rationale of the decision was the need of a state for federal relief of abatement of pollution coming from beyond its borders. In discussing the criteria for adjudication in such suits, the Court stated: "there are no fixed rules that govern; these be *equity* suits in which the informed judgment of the Chancellor will largely govern" (emphasis added) (406 *U.S.* at 107-108). Obviously damage suits were not in contemplation.

3. Policy considerations relative to the best interests of a national water pollution strategy argue for restriction of the federal nuisance action.

The argument we now make is pertinent not only to the point here under consideration but also to the matter of preemption of any federal common-law nuisance actions by the comprehensive regulatory mechanism created by FWPCA and MRPSA, argued hereinafter. The policy considerations which bespeak preclusion of the nuisance remedy in the water pollution area obviously militate at least for restriction of the remedy to actions by states, as proposed in the present point. We therefore develop the policy considerations at the present juncture.

There is practically unanimous agreement of the scholars in environmental law as to the inutility of the judicial approach to abtement of water pollution through common-law nuisance as contrasted with comprehensive statutory and regulatory machinery.

In his "Treatise On Environmental Law" (1979), which followed the adoption of the 1972 FWPCA amendments, Professor Grad of Columbia states:

> "The development of a federal common law of public nuisance—*limited, hopefully, to actions between states*—was probably a response to the inadequacies of past federal regulatory enactments in the air and water pollution control field. The law of nuisance has been far from clear in its application to modern water pollution and air pollution situations. It is in response to the inadequacies and lack of standards of the law of nuisance that much environmental regulatory legislation has been developed. The development of a federal common law of nuisance seems both unnecessary and unwarranted in the light of recent federal standards and federal enforcement sanctions provided under appropriate legislation. It may be useful to point out that the assertion of a federal law of nuisance in the Illinois v. City of Milwaukee case is clearly dictum. It is to be hoped that this peculiar and unnecessary departure from legislatively determined standards in the field will not see any further development. *Indeed, perhaps the time has already come that federal regulations 'pre-empt the field of federal common law of nuisance,'* as predicted by Mr. Justice Douglas." Vol. I, Grad, *supra* at § 3.03, p. 3-180 (emphasis added).

In a perceptive and widely cited Note written just prior to the decision in *Illinois* v. *Milwaukee,* and critical of *Texas* v. *Pankey, supra,* it was stated:

> "This denial [by rejection of *Texas* v. *Pankey*] of the power of the federal courts to fashion an environmental common law in state-nonresident cases does not entail the closing off of a source of substantive legal principles which might make any major contribution to the nation's efforts to address the environmental crisis. *Pankey* adds to lawmaking powers the federal courts already possess only a power to formulate broad standards of environmental conduct, a task courts are not well equipped to perform in environmental areas. Tasks courts are well equipped to perform in the environmental area—the definition of rights and liabilities to be created or imposed as consequences

> of compliance or noncompliance with statutorily or administratively established standards—may be undertaken by the federal courts through doctrines of judicial lawmaking power which were established long before *Pankey* and to which *Pankey* is irrelevant." Note, "Federal Common Law and Interstate Pollution", 85 *Harv. L.Rev.* 1439, 1451 (1972).*

The Note writer goes on to point out that the addition of federal common-law nuisance jurisdiction to the remedial apparatus relative to water pollution "is not especially significant to the effort to develop" appropriate "standards to impose on conduct affecting the environment". *Ibid.* The writer furnishes two reasons for the conclusions:

> "First, that task can be and is performed on the federal level by statutory provision and administrative process; recently-or soon-to-be-enacted federal legislation, for instance, provides for the promulgation of relatively comprehensive federal standards to govern industrial air and water pollution. Second, even when such standards are not provided by statute, the common law does not provide an adequate alternative context within which to develop such standards. Although various elements of tort law—nuisance law in particular, and, to lesser extents, certain elements of trespass and negligence law—formally provide a framework within which such standards could be evolved, case-by--case adjudication is fundamentally inadequate to consider and weigh properly the many and varied interests environmental standards must reflect and thus to contribute to the type of comprehensive planning necessary for environmental control." *Id.* at 1451-1452 (footnotes omitted).

---

* This note was described as "an intelligent analysis of the problems of creating a federal common law in the context of interstate pollution suits" in Hart & Wechsler's "The Federal Courts and The Federal System" (2d Ed. 1973, Bator, Mishkin, Shapiro & Wechsler) at 806.

Complementary to the foregoing observations is the case made by Robert Zener (formerly EPA counsel) against the utility of the common-law nuisance approach from the standpoint of the vital necessity of affording dischargers, public or private, notice of what standards the law requires them to meet. Zener, "The Federal Law of Water Pollution Control", in E. Dolgin & T. Guilbert, "Federal Environmental Law" (1974), 788. As Zener says:

> "The case-by-case balancing approach adopted by the Court in Illinois v. Milwaukee* imposes a severe constraint on the utility of the federal common law as a significant means of regulating water pollution. This approach means that until a federal court has issued an order directed to his own particular operation, *no discharger can be sure what the standard applicable to him will be.* All the discharger knows is that if he is sued under the federal common law, the court will balance the equities; but he cannot tell whether the balance will be struck at 75 percent removal, 90 percent removal, or some other figure. Only an administratively established standard can tell the discharger the precise level of control he must achieve. And most dischargers will not spend the substantial sums needed for pollution control equipment until they know the precise levels they must achieve under the law." *Id.* at 788 (emphasis added).

It is plain from all these observations that "poor old nuisance"** not only serves no functional value in the ap-

---

* "There are no fixed rules that govern; these will be equity suits in which the informed judgment of the Chancellor will largely govern". *Illinois* v. *City of Milwaukee, supra,* 406 *U.S.* at 107-108).

** "Poor old nuisance has been the common law's meager response to the crowdedness of society. The doctrine is pathetically inadequate to deal with the social realities of this half-century". Wright, "The Federal Courts and The Nature and Quality of State Law", 13 *Wayne L.Rev.* 317, 331 (1967).

proach to a rational body of water pollution abatement law, but is a detriment to its implementation.*

In "Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy", 86 *Yale L.J.* 1196 (1977), Professor Stewart of Harvard makes a strong case for federal enlistment of states in the regulatory mechanism for control of water pollution, particularly in relation to spillovers of pollution from one state to another. He anticipates possible constitutional challenge, and he urges the courts to reject such challenge, saying:

> "It is an invitation they should refuse. Because of political and administrative constraints, Congress must often deal with spillover problems in a generic fashion. A case-by-case judicial determination of whether federal statutory impositions on states were warranted in particular instances would, in effect, make the judge-made common law of interstate pollution superior to congressional statute. It would also loose the bonds of compromise that may have been politically indispensable for the enactment of such a statute in the first place. The resolution of substantial interstate conflicts should be left in the hands of the national forum in which all states are represented under the formula of the Great Compromise." *Id.* at 1230.

Whether or not this Court will agree with our argument for general preemption of federal tort suits against regulated public sewerage agencies, as presented in the next Point, restriction of the federal nuisance remedy against

---

* For abundant additional testimony against the utility of the judicial common-law approach in environmental law, see Krier, "Environmental Law and Policy" (1971) at 208-232.

use by private plaintiffs will at least tend to subserve the considerations noted by the foregoing authorities.*

There is no predictability about a judgment in a nuisance case. The *Restatement of Torts, Second* (1977), defines a public nuisance as "an unreasonable interference with a right common to the general public". Section 821B. Reasonableness is defined in terms of whether "the gravity of the harm outweighs the utility of the actor's conduct" or "the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible". *Id.*, Section 826. The unserviceability of such criteria, in relation to the potential liability of a public sewerage agency necessarily operating under statutes and regulations concerning water pollution as thoroughly considered as those here involved, is reflected by comment (f) to Section 821(B) of the Restatement (at p. 91):

> "* * * If there has been established a comprehensive set of legislative acts or administrative regulations governing the details of a particular kind of conduct, the courts are slow to declare an activity to be a public nuisance if it complies with the regulations".

We would take that comment one step further to suggest that the courts should bar an action to penalize as a public nuisance activities in the interest of the public's

---

* The approach suggested would be consistent with the fact that federal common-law of necessity evolves on a case-by-case basis, largely influenced by notions of policy. See Friendly, "In Praise of Erie—And Of The New Federal Common Law" 39 *N.Y. Univ. L.Rev.* 383, 405 *passim* (1964). The instances in which the Court since *Erie R. Co.* v. *Tompkins*, 304 *U.S.* 64 (1938), has created Federal common law "are few and restricted", *Wheeldin* v. *Wheeler*, 373 *U.S.* 647, 651 (1963). See also *Stone* v. *Powell*, 428 *U.S.* 465, (1976), where this Court deliberately restricted the *habeas corpus* federal jurisdiction to subserve a policy objective.

health, safety and convenience such as those being pursued by these petitioners under the statuory and regulatory mechanism now in place. See the further development of this viewpoint in the next Point of this brief.

Finally, it should be noted that preclusion of privately brought actions for water pollution in federal courts would not leave private citizens harmed by pollution originating in the waters of another state remediless. Under present rules of minimum contacts, jurisdiction over foreign polluters could be had in local state courts.

In summary, we submit that federal jurisdicstion should be closed to private actions under the rubric of nuisance for redress of water pollution attributable to EPA permittees, at least as to publicly owned sewerage agencies like these petitioners, functioning under federal regulatory supervision.*

---

* In *Wallis* v. *Pan American Petroleum Corp.*, 384 *U.S.* 63 (1966), it was held that federal common law should not be fashioned to supersede state law in a given area merely because there was latent federal power over the subject matter.

The court said:

> "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress * * *. Because we find no significant threat to any identifiable federal policy or interest we do not press on to consider other questions relevant to invoking federal common law * * *" (384 *U.S.* at 68).

Similarly, we here suggest that the mere latency of federal power over navigable or interstate waters raises no significant threat to any identifiable federal policy or interest in prohibiting private parties from suing public sewerage agencies for pollution damages in federal courts. The vaunted interest in uniformity of federal common law in this area is illusory since common-law nuisance judgments rendered by different judges on differing records, as clearly shown above, will not be uniform. Uniformity, within reasonable classifications, is found in the statutory regulatory system now governing ocean pollution.

POINT III

If a federal common-law nuisance action for ocean pollution is otherwise available to a private citizen, such an action should be held preempted by the present regulatory scheme in that area established by the FWPCA and the MPRSA.

We assume from the form of the third question listed by the Court in the order granting certiorari that the Court is not inviting reconsideration of the expression in *Illinois* v. *Milwaukee* that federal courts have common-law nuisance jurisdiction in actions brought by states for interstate water pollution.* We assume we are to argue only that preemption of such actions should apply when brought by a private citizen. The argument hereinafter proceeds upon that assumption.

Moreover, it is not our contention that no privately maintained tort action whatsover may be brought in a federal court against an ocean polluter but only that such actions are precluded if brought against any discharger functioning under a permit issued either under the authority of FWPCA or MPRSA. If a proposition of even that limited scope is not acceptable to the Court, we would argue that at the very least there should be preemption as respects suits against publicly owned waste treatment agencies, as we believe there is sufficient distinction between an industrial discharger and a public one to justify extending the preemptive effect of the regulatory statutes to the latter, if the Court will not accept preemption as to the

---

* Were we free to make the argument, we would contend that even such suits by states should be preempted as against defendant public sewerage agencies operating under EPA regulations, for the reasons hereinafter set forth. It has been suggested that such preemption "may have" occurred by reason of the 1972 amendments of FWPCA. *Com. of Mass.* v. *United States Veterans Admin.*, 541 *F.Supp.* 119, 121 (1 Cir. 1976).

former because it may be thought necessary to reserve the question of tort relief in specific industrial situations notwithstanding the regulatory statutes.

1. The "savings clauses" of FWPCA and MPRSA do not preclude a finding of preemption.

The initial contention which will be made against our position is that the savings clauses of both of the regulatory statutes in question implicitly militate against the concept of preemption. There are at least two broad responses to any such argument.

In the first place, these savings clauses are typical of those set forth in a number of other comparable regulatory statutes adopted by Congress during the initial stages of the development of a regulatory apparatus in respect of environmental or similar regulation. See for example the Toxic Substances Control Act, 15 *U.S.C.* §2619(c)(3) (Supp. I); the Safe Drinking Water Act, 42 *U.S.C.* §300(j)-8(e) (Supp. II); the Noise Control Act of 1972, 42 *U.S.C.* §4911 (e); and the Clean Air Amendments of 1970, 42 *U.S.C.* §7604(e) (Supp. II). The savings clauses of all of these statutes are closely comparable with those contained in FWPCA and MPRSA. The evident general Congressional policy was that in the light of the doubt as to whether conduct potentially actionable under other statutes or common law was sufficiently comprehensively addressed by the regulatory statute then being enacted, it was a wise precaution to save such other remedies as might exist and might be necessary to afford needed relief in specific situations not adequately dealt with by the remedial statutes.

However, regulatory statutes typically are expanded in scope and effectiveness as experience and research counsel, and the continued retention of the savings clauses in such statutes as a precautionary device should not militate inflexibly against a judicial inquiry as to whether at a given

point the statute has not become so comprehensive as to be deemed preemptive of any other remedial jurisdiction. So, too, here. We thus contend that the citizens remedy sections of FWPCA and MRPSA do not sensibly weigh against a judicial inquiry at this time as to whether a particular form of common-law remedy attempted to be asserted in the instant circumstances should not be held precluded by those statutes in their present comprehensive state. If the availability of a federal common-law nuisance action would constitute an "obstacle to accomplishment and execution of the full purposes and objectives of Congress", *Jones* v. *Roth Packing Co.,* 430 *U.S.* 519, 526 (1977), there should be preemption. So, too, upon a determination that such an action would conflict with the "implicit legislative design of the statute" or produce "general incompatibility with basic federal objectives", *Philadelphia* v. *New Jersey,* 437 *U.S.* 617, 620, n.4 (1978). Similarly, preemption might be justified because of the "pervasive nature of the scheme of federal regulation" involved. *Burbank* v. *Lockheed,* 411 *U.S.* 624, 633 (1973).

Our second response to any attempted refutation of preemption based upon the savings clauses of the statutes is that we contend only for a limited degree of preemption. Preliminarily, as already noted, we are not arguing for preemption of a federal action brought by a state for out-of-state originated pollution. Nor do we contend for preemption as to persons or corporations which are not functioning under permits issued by the regulatory agencies pursuant to the statutes here in question. Moreover, except to the extent that there is specific preclusion of actions against administrators, state or federal, under these statutes, we do not contend for preemption as against actions by aggrieved persons against such officials if there is any other federal jurisdictional and substantive basis for the maintenance thereof. *Cf. Califano* v. *Sanders, supra,* (430 *U.S.* 99).

2. The present scope of FWPCA and MPRSA justifies preemption of federal common-law nuisance actions against sewerage agencies which discharge effluent and dump sewerage sludge under permits pursuant to those statutes.

In *Illinois* v. *Milwaukee,* the court made the prescient observation that:

> "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution." 406 *U.S.* at 107."

When Illinois was decided, the 1972 and 1977 amendments of FWPCA had not yet come into effect nor had Congress enacted MPRSA. If the instant case involved only a complaint based upon discharge of effluent, we would contend that the substantially enlarged regulatory scheme promulgated by the 1972 and 1977 amendments of FWPCA justified a present determination of preemption of the common-law action as against sewerage agencies operating under EPA permit. However, the complaint herein, although including allegations of pollution through discharge of effluent, is obviously primarily based upon the dumping of sewage sludge by the defendant public sewerage agencies. It is consequently pertinent to inquire whether MPRSA, enacted after the *Illinois* case was decided, and designed to regulate and control the dumping of sewage sludge, among other ocean pollutants, does not, in combination with the scope and effect of FWPCA, preempt the maintenance of this action as a nuisance suit in a federal court. Our submission is that that inquiry should be answered in the affirmative.

(a) FWPCA is now of preemptive scope.

Even a brief comparison of the salient differences between the federal water pollution legislation as it stood prior to 1972 and the FWPCA under the amendments of 1972 and 1977 is convincing that the time for declaration of preemption of common-law nuisance actions, at least to the extent here argued for, has arrived.

Prior to 1972 the principal federal statutes concerning water pollution were 33 *U.S.C.* (1970 ed.) §1151 *et seq.* and Section 13 of the Rivers and Harbors Act of 1899, 33 *U.S.C.* § 407. Under the previous water pollution legislation the main pollution control mechanism consisted of the setting of ambient water quality standards, establishing permissible levels of pollution in interstate waters. 33 *U.S.C.* (1970 ed.) §1160(c). The states were given the primary responsibility for developing the water quality standards and were also called upon to devise plans for implementation consistent with statutory criteria. 33 *U.S.C.* (1970 ed.) §1160(c)(1), (c)(3). If a state either failed to establish a water quality standard or announced an inadequate one, EPA would be required to promulgate its own water quality standards in consultation with state authorities. 33 *U.S.C.* (1970 ed.) §1160(c). See *EPA* v. *Water Resources Control Board, supra* (426 *U.S.* 200, 202-203).

Under the original FWPCA it was the states which were assigned the first-instance responsibility for enforcing water standards. They were also permitted to establish enforcement procedures in respect of intrastate pollution. Provision was also made for a procedure for enforcement conferences among state and federal officials and other concerned persons if a discharge into interstate waters either reduced the quality thereof below established standards or was otherwise dangerous to the general health or welfare. 33 *U.S.C.* (1970 ed.) §1160(a),

(c)(5), and (d). If the dispute was not settled and the discharges continued six months after notice of a violation the United States was then authorized to institute action for abatement. 33 *U.S.C.* (1970 ed.) §1160(a), (c)(5), and (g).

The regulatory and enforcement procedures by the states were spotty and inconsistent. Under them, it was "very difficult to develop and enforce standards to govern the conduct of individual polluters." *EPA* v. *Water Resources Control Board, supra* (426 *U.S.* at 202-203). Consequently, EPA established a Refuse Act Permit Program ("RAPP") under the Rivers and Harbors act. That program prohibited the discharge of any substance into navigable waters without a federal permit. See *EPA* v. *State Water Resources Control Board, supra,* (426 *U.S.* at 203). This program, however, applied only to industrial dischargers; it did not govern the discharges of public sewage treatment systems.

The 1972 Amendments of FWPCA completely rewrote the statute, effected stricter standards for elimination of pollution of the nation's waters, tightened the enforcement procedures, brought EPA more directly into the regulatory process and created a more effective system for oversight by EPA of state enforcement rules and regulations.

The statute now declares that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985". 33 *U.S.C.* §1251(a)(1). Focusing on that objective, Congress expanded the EPA research demonstration and funding programs of the original statute and established a new system of standards and permits keyed to developing technological research and aimed at accomplishing effluent limitations on all point

sources* as well as achieving acceptable water quality standards. *EPA* v. *State Water Resources Control Board, supra,* 426 *U.S.* at 204.

The statute requires EPA to set stringent effluent limitations for municipal dischargers, among others. 33 *U.S.C.* §1311(b). Public sewerage works must institute secondary treatment by July 1, 1977. 33 *U.S.C.* §1311 (b)(1)(B), §1314(d)(1). By July 1, 1983 such agencies must achieve the "best practicable waste treatment technology over the life of the works". 33 *U.S.C.* §1311(b) (2)(B), §1281(g)(2)(A).

Each state is now directed to promulgate water quality standards governing all interstate and intrastate waters, under oversight by EPA, and to review such standards at least once every three years. 33 *U.S.C.* §1313(a),(c), (d),(e). The states are permitted to impose more stringent effluent limitations or other forms of pollution control than those set by EPA, subject to EPA approval. 33 *U.S.C.* §1370. The act specifies certain restrictions on EPA in terms of cost justification in setting forth effluent limitation standards. 33 *U.S.C.* §1312(a),(b).

Of particular significance in the present regard is the establishment by the revised legislation of the National Pollutant Discharge Elimination System ("NPDES") (33 *U.S.C.* §1342) which is designed "to transform generally applicable effluent limitations and other standards—including those based on water quality, into the obligations (including a timetable for compliance) of the original discharger". *EPA* v. *State Water Resources Control Board, supra,* 426 *U.S.* at 205. It is unlawful for any person to discharge pollutants into the interstate or navigable

---

* "Point source" means any "discernible, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel, conduit, well, ** or vessel or other floating craft, from which pollutants are or may be discharged**". *33 U.S.C.* §1362 (14).

waters without a NPDES permit. Such permits are issued by the EPA and by states where EPA has authorized a state agency to administer the NPDES program. The instant petitioners hold EPA NPDES permits.

Any interested party, including a state whose waters may be affected by the discharges in question, is entitled to notice and an opportunity for a hearing regarding the issuance of a permit. 33 *U.S.C.* §1342(a)(1), (b)(3)-(d)(5).

The revised FWPCA also strengthens the enforcement provisions of the statute. Criminal penalties are prescribed for willful or negligent violations of the act, 33 *U.S.C.* §1319(c), and EPA is authorized to bring civil enforcement actions for appropriate relief, including injunctions, and for specified civil penalties. 33 *U.S.C.* §1319(a),(b),(d). In certain circumstances states and adversely affected private persons may also bring enforcement actions. 33 *U.S.C.* §1319(a)(1).

A significant aspect of the revised legislation was the provision for massive infusion of federal grant funds to local sewerage agencies for construction and improvement of treatment plants and processes, for research and investigation of water pollution problems and in general for expediting the achievement of the statutory objectives by the targeted dates. See, illustratively, 33 *U.S.C.* §1281 (g),(h),(j).

The Senate Public Works Committee stressed the fiscal aspects of the program:

> "To assist states and localities, the bill proposes a four year program of Federal grants for construction of sewage treatment plants. The Federal matching funds total 14 billion dollars through fiscal year 1975.
>
> The minimum Federal grant is set at 60 percent of project costs. If a state contributes as much as 10 percent of project costs, the Federal grant

> is increased by a matching 10 percent. A locality's share thus becomes 20 percent of project costs." S. Rep. No. 92-414, 1972 *U.S. Code Cong. & Adm. News,* 3668, 3674.

Substantial additional federal appropriations have been made to support research and development, as well as administration.

By amendment in 1977 it was mandated that any guidelines for cost-effectiveness analysis promulgated by EPA must provide for selection of "cost effective alternatives" for many of the waste management improvement devices called for elsewhere in the statute. 33 *U.S.C.* §1297. Thus did Congress manifest new concern with the economics of pollution abatement.

Congress made evident its intent that local sewerage agencies could rely upon compliance with the statutes as meeting any liability for water pollution. The Senate report stated:

> "Water pollution control in the past has all too often been sporadic, inconsistent, and improvised on an ad hoc basis. The major purpose of this legislation is to establish a comprehensive long-range policy for the elimination of water pollution, making it clear to industry and municipalities alike the pollution control performance which will be expected over the next decade." S. Rep., 1972 *U.S. Code Cong. & Adm. News,* p. 3758.

In discussing the citizens suit provisions of the act, the Senate Committee sought to assure dischargers that they would have only objectively determinable standards to meet. The report stated:

> "Section 505 [1365] would not substitute a 'common law' or court-developed definition of water quality. An alleged violation of an effluent control limitation or standard would not require reanalysis of technological in [sic] other considerations at the enforcement stage. These matters will have been

> settled in the administrative procedure leading to the establishment of such effluent control provision. Therefore, an objective evidentiary standard will have to be met by any citizen who brings an action under this section." S. Rep. 1972 *U.S. Code Cong. & Adm. News* at p. 3745.

This expression is hardly compatible with a supposed legislative intent that dischargers, besides having to meet EPA standards, would *additionally* be in peril of whatever unpredictable standard a common-law judge deemed "reasonable" in a nuisance action.

(b) MPRSA is of preemptive scope.

MPRSA, adopted in 1972 after the *Illinois* decision, and amended in 1977, is fully as comprehensive in the area of ocean dumping as is FWPCA in that of water pollution generally. By the enactment Congress declared it to be the policy of the United States "to regulate the dumping of all types of materials into ocean waters and to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities". 33 *U.S.C.* §1401(b). Except as authorized by a permit issued pursuant to either Section 1412 or Section 1413 of the title, and subject to regulations issued pursuant to Section 1418 of the title, all transportation of any material for the purpose of dumping it into the ocean, as well as the dumping itself was prohibited. 33 *U.S.C.* §1411.

Except as to dredged material, regulated by Section 1413 of the statute, and in relation to radioactive waste, for which no permit could be issued, EPA was authorized to issue permits for dumping material into ocean waters where the administrator determined "that such dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, eco-

logical systems or economic potentialities." 33 *U.S.C.* §1412. In establishing such criteria the administrator was directed to consider, although not be limited to: the need for the proposed dumping; the effect of such dumping on human health and welfare; the effect of such dumping on fisheries resources, shorelines and beaches; the effect of such dumping on marine ecosystems; the persistence and permanence of the effects of the dumping; the effect of dumping particular volumes and concentrations of such materials; appropriate locations and methods of land-based alternatives and "the probable impact of requiring use of such alternate locations or methods upon considerations affecting the public interest"; and the effect on alternate uses of oceans. 33 *U.S.C.* §1412(a).

In establishing or revising such criteria the administrator was directed to consult with federal, state and local officials and interested members of the general public. No permit could be issued for a dumping of material which would violate applicable water quality standards. The administrator was authorized to designate sites and times for dumping. 33 *U.S.C.* §1412(c). A particular effort was made for consistency of this statute with the FW PCA amendments. S. Rep. No. 92-451 1972, *U.S. Code & Adm. News,* 4234, 4257.

As noted above, by virtue of the 1977 amendment of MPRSA, a terminal date was set for the ocean dumping of sewage sludge, *i.e.* December 31, 1981. 33 *U.S.C.* §1412a..

EPA has promulgated and is enforcing against all ocean dumpers of sewage sludge, including the New Jersey agency petitioners in this case, a highly detailed set of regulations for permits, geared to fixed schedules aimed at effecting cessation of ocean dumping of sewage sludge by the end of 1981.

The statute contains the same citizens suit provisions as FWPCA, including a savings clause. 33 *U.S.C.* §1415

(g)(5). It contains detailed civil and criminal sanctions for its enforcement. §1415.

While, under the act, the states are prohibited from adopting or enforcing any rule or regulation relating to ocean dumping, any state is permitted to propose to the administrator criteria relating to the dumping of materials into ocean waters within its jurisdiction or into other ocean waters to the extent of affecting waters within the jurisdiction of that state. 33 *U.S.C.* §1416(d). The administrator is permitted to adopt such criteria and issue accordant regulations to implement them if after hearing he determines that they are not inconsistent with the purposes of the law. *Ibid.*

Congress has made available very substantial funding for the design and creation under EPA supervision of suitable facilities as land-based alternatives for disposition of sewage sludge. MCSA has made applications for grants for such purposes and is in the course of active progress toward achieving land-based disposition of sewage sludge at an early date. It is believed that the other New Jersey petitioner agencies are also in the same process. However, very substantial technological-environmental* and financial difficulties need to be overcome in order to attain the statutory goal of termination of ocean dumping of sewage sludge by the end of 1981.

In these regards, it is significant that the statute mandates comprehensive and far-reaching research programs. 33 *U.S.C.* §1441 *et seq.* As of the date of adoption of

---

* Land-based alternatives to ocean dumping of sewage sludge are mainly either incineration or land-fill or composting. These, respectively, present substantial problems of pollution of the air and of leaching into subterranean aquifers. Note that in dealing with grants for construction of treatment works Congress directed in FWPCA that care should be taken that the ultimate disposal of sludge be effected "in a manner which will not result in environmental hazards". 33 *U.S.C.* §1281(d)(4).

the statute "only meager information [existed] with regard to what concentrations and which of the chemicals or toxicants have deleterious effects on the marine ecology and what processes can best be utilized to treat or remove such materials prior to discharge to the marine waters". S. Rep. No. 92-451, 1972 *U.S. Code Cong. & Adm. News,* 4232, 4240. The field involved is obviously one of high scientific and economic technicality, especially suited to oversight by an expert administrative agency operating under fixed and uniform Congressional guidelines, rather than by *ad hoc* disposition in common-law tort suits.

3. Considerations of law and policy bespeak preemption in this area.

Various tests for preemption by statute laid down by this Court meet the present situation. The regulatory statutes as they now stand demonstrate an "implicit legislative design" calling for preemption, see *Philadelpia* v. *New Jersey, supra,* (437 *U.S.* at 620, n.4), and any continued availability of federal common-law nuisance actions against sewerage agencies operating under the regulatory statutes would entail "the general incompatibility with basic federal objectives" implicit in such legislation. *Ibid.* In our view, continued acceptance by federal courts of nuisance actions against public sewerage agencies situated like these petitioners would "prevent the accomplishment and execution of the full purposes and objectives of Congress" in creating the regulatory mechanism represented by FWPCA and MPRSA. *Jones* v. *Roth Packing Co., supra,* (430 *U.S.* at 526). See also *Burbank* v. *Lockheed, supra* (411 *U.S.* at 633), commenting upon "the pervasive nature of the scheme of federal regulation" involved in the statute there held to effect preemption of state law.

It does not seem to us that it should make any difference that the object of preemption is federal common law

as distinguished from state law. The same principles appear logically applicable, and are, indeed, compelled by the doctrine of federal legislative supremacy in matters of national concern.

We note that at this writing the question of preemption of a state's right to bring a federal common-law nuisance action against a public sewerage agency is before this court on certiorari (No. 79-408) to review the decision of the Seventh Circuit Court of Appeals in *People of State of Ill.* v. *City of Milwaukee,* 599 *F.2d* 151 (1979). While we are in agreement with the position of Milwaukee in that case, we would not regard an affirmance of the Court of Appeals there as precluding a holding in favor of these petitioners in this case. Our position is consistent with the continued viability of a federal nuisance action when instituted by a state. Secondly, the instant case involves the matter of ocean dumping of sewage sludge—not a factor in the *Illinois* case. Success of the instant plaintiffs would entail the inculpation of ocean dumping as much or more than discharge of sewage effluent. The interrelated and cumulative comprehensiveness of FWPCA and MPRSA in the ocean pollution area impellingly suggests a grand strategy by Congress in these related fields to preclude further maintenance of harassing common-law nuisance actions in federal courts against public sewerage agencies attempting to meet the goals of these statutes.

The anomaly of judicial proscription of conduct expressly permitted by authorized regulatory agencies has been noted in several decisions. See *Committee for Jones Falls Sewage System* v. *Train,* 535 *F.2d* 1006, 1009 (4 Cir. 1976); *Potomac River Ass'n. Inc.* v. *Lundeberg Maryland Seamanship Schools,* 402 *F.Supp.* 344 (D. Md. 1975); *New England Legal Foundation* v. *Costle,* 475 *F.Supp.* 425, 441-442 (D.Conn. 1979). ("This Court will not devise an equitable remedy to proscribe the very conduct that EPA, acting in its regulatory capacity pursuant to statutory man-

date, has specifically legitimated"); *cf. United States* v. *Atlantic-Richfield Co.*, 478 *F.Supp.* 1215, 1218 n.5 (D. Mont. 1979), where the court, although failing to find preemption against a tort action by the United States in the Clean Air statutory context, nevertheless said:

> "There are many reasons which would make one exclusive administrative system of controlling air pollution desirable. The whole matter is highly complex and involves the intricacies of chemistry, engineering and economics. Courts are not especially equipped to deal with these problems * * * If the courts are permitted to interfere, their decisions will sooner or later come into conflict with the administrative decisions and create confusion and uncertainty".

In *Committee for Jones Falls Sewage System* v. *Train, supra,* (539 *F.2d* 1006), in rejecting on the merits an action by private groups and individuals to enjoin the grant of EPA permits for sewer connections and to revoke other existing permits, Judge Haynsworth wrote:

> "Indeed it would be an anomaly to hold that there was a body of federal law which proscribes conduct which the 1972 Act of Congress [FWPCA] legitimates. The defendants are in compliance with the statute. They are operating under a permit issued in accordance with the statute and the authorization of the EPA. The Congress and the Executive Department, acting through the EPA, have declared their conduct lawful until the time for the application of more restrictive standards." *Id.* at 1009.

It is earnestly submitted that every consideration of sound law, environmental policy and the expeditious achievement of the legislative goals here implicated dictates immunity from federal common-law nuisance litigation for public sewerage agencies which are functioning under the regulative control and oversight of the agencies charged with the administration and enforcement of

FWPCA and MPRSA. Such sewerage agencies should not have to meet multiple inconsistent discharge or dumping standards. Moreover, it seems particularly invidious that such agencies should have to face the prospect of multi-million dollar damage suits, the successful consummation of which would clearly operate at cross-purposes with established federal pollution-control policy and divert to private coffers dollars sorely needed to meet the difficult technological requirements of compliance with federal regulations. Damage judgments in such actions would also indirectly subvert the federal funds being appropriated by Congress to these agencies to assist financially hard-pressed local communities in meeting the federal objectives. Such results cannot reasonably be thought within the legislative contemplation as derived from a fair appraisal of the statutes and their history.

The same considerations are supported by the unanimous view of the legal-environmental experts, quoted hereinabove, to the effect that the judicial common-law approach to environmental pollution is functionally useless *vis-a-vis* the alternative of comprehensive federal legislative and administrative regulations and in fact is incompatible with the latter.

For the foregoing reasons, it is submitted that preemption of the federal common-law nuisance remedy, at least to the limited extent argued for herein, should be judicially determined in this cause.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Court of Appeals should be reversed and the complaint ordered dismissed as against these petitioners.

Respectfully submitted,

STEPHEN J. MOSES
1 Essex Street
Hackensack, New Jersey 07601
(201) 343-6612
Counsel for Petitioner,
Bergen County Sewerage Authority
MENELAOS W. TOSKOS
Of Counsel

VINCENT J. JENNINGS
Of Counsel for Petitioner
Township of Middletown Sewerage Authority
Furman & Jennings, Attorneys

MILTON B. CONFORD
Wilentz, Goldman & Spitzer
A Professional Corporation
900 Route 9
Woodbridge, New Jersey 07095
(201) 636-8000
Counsel for Petitioners,
Middlesex County Sewerage Authority and
Township of Middletown Sewerage Authority
FRANCIS X. JOURNICK
MARVIN J. BRAUTH
Of Counsel